KENNESION BROTHERS SDN. BHD.

v.

CONSTRUCTION WORKERS UNION

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 555 OF 1987]
5 MAY 1989

LABOUR LAW: *Appeal concerning dispute over revocation or withdrawal of recognition accorded by the appellant/employer to the respondent/trade union under s. 9(3)(a) Industrial Relations Act 1967 to represent workmen of appellant - Whether appellant can after according recognition revoke or withdraw such recognition unilaterally on account of an earlier decision of the Registrar pertaining to a distinct and separate application for recognition - Sections 9 and 12, Industrial Relations Act 1967.*

On 25 June 1983 the respondent served on the appellant a claim for recognition under s. 9(2) of the Industrial Relations Act 1967 to represent all workmen employed by the appellant except those excluded by s. 9(1). Apart from carrying on the business of civil engineering and building contractors, the appellant was also in the quarry business. Acting under s. 9(3)(c), the appellant applied to the Director-General of Industrial Relations for ascertainment whether all the workmen in respect of whom recognition was being sought could be classified as workers in the construction industry to enable the respondent to represent them. The Director-General exercised his discretionary power under s. 9(4B)(b), and referred the matter to the Registrar of Trade Unions for a decision to represent on the question of competency of the respondent to represent all the workmen employed by the appellant as contained in its application. By letter dated 23 January 1984 both the appellant and the respondent were informed by the Director-General that the Registrar had decided that the respondent was not competent to represent the workmen employed in the business of the appellant. The matter was not referred to the Minister for final decision under s. 9(4C)(5) and (6).

But, more than six months later the respondent served on the appellant a second claim for recognition but, this was limited to workers employed at the appellant's quarry at Batu Caves worksite. By letter dated 1 July 1985 the appellant straight-away accorded recognition to the respondent not only in respect of quarry workers at Batu Caves, but also of those employed at its Hulu Langat quarries, except those workers excluded by s. 9/17 and also made an open invitation for a meeting to discuss the collective agreement. The parties commenced collective bargaining on 1 August 1985 and although most of the terms of a draft collective agreement were agreed to, no final agreement could be reached due to certain items. Finally, by letter dated 12 November 1986, the respondent withdrew all the items on which the appellant stood firm but his concession proved insufficient. The respondent then on 28 January 1987 wrote to the Director-General for conciliation under s. 18 and on 13 March 1987, the Director-General invited both parties to a conciliatory meeting fixed for 30 March. However, on 3 April 1987, the appellant took the unusual step of unilaterally revoking the recognition accorded on 1 July 1985 before the Director-General could settle the trade dispute. The reason given by the appellant was that the recognition was a mistake as it was contrary to the 1984 Registrar's decision referred earlier.

By originating summons dated 1 September 1987, the respondent applied for a declaration that the purported unilateral revocation of the 1985 recognition by the appellant pursuant to s. 9(3)(a) of the Act was illegal, invalid and of no effect. The learned trial Judge allowed the application on the ground that once a trade union had been accorded recognition by an employer, that recognition could not be revoked. The appellant then appealed to the Supreme Court.

Both in the Supreme Court and in the High Court, the respondent's case was based primarily on the arguments that once a recognition is accorded under s. 9(3)(a), there is no power under the Industrial Relations Act to withdraw or revoke it unilaterally. The appellant's answer to that argument is that no employer can legally recognise or continue to recognise a union already held to be ineligible or incompetent for recognition by the Registrar.

Held:

[1] Once the employer has accorded the recognition under s. 9(3)(a) of the Industrial Relations Act, there appears to be no provision in the Act, enabling the employer to act unilaterally in withdrawing or revoking the recognition.

[2] On the facts of the present case, the appellant cannot after according recognition to the respondent under s. 9(3)(a) of the Industrial Relations Act revoke or withdraw such recognition unilaterally on account of an earlier decision of the Registrar pertaining to a distinct and separate application for recognition.

[3] To allow the appellant to do so is not only inequitable but also contrary to the intention of the legislature in s. 12 which allows a trade union to make a fresh claim for recognition even in a situation where the Minister has made a final decision against recognition provided six months had elapsed from the date of such decision.

[Appeal dismissed with costs.]

Cases referred to:

Attorney-General Malaya v. Chemical Worker's Union of Malaya & Anor. [1971] 1 MLJ 38
Electrical Industry Workers Union v. Registrar of Trade Unions & Anor. [1976] 1 MLJ 177
Metal Industry Employees Union v. Registrar of Trade Unions & Ors. [1976] 1 MLJ 220
Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor. [1987] CLJ (Rep) 368

Legislation referred to:

Industrial Relations Act 1967, ss. 9(1), (1A),(2), (3)(a), (3)(c), (4A), (4B)(b), (4C)(5), (6)

For the appellant - C.V. Das, (S. Nanthabalan with him;) M/s. Shook Lin & Bok
For the respondent - P. Kuppusamy; M/s. P. Kuppusamy & Co.

JUDGMENT

Mohd. Azmi SCJ:

This appeal concerns a dispute over the revocation or withdrawal of recognition accorded by the appellant/employer to the respondent/trade union under s. 9(3)(a) of the Industrial Relations Act 1967 to represent workmen employed at the Batu Caves and Hulu Langat worksites of appellant's quarries. Sadly, this is yet another instance, where the Court is required to determine an appeal without the benefit of a written judgment.

The brief facts of the case may be summarised as follows. On 25 June 1983 the respondent served on the appellant a claim for recognition in the prescribed Form "A" under s. 9(2) of the Act to represent all workmen employed by the appellant except those excluded by s. 9(1) i.e., workmen employed in the managerial executive, confidential or security capacity (see document attached to Exhibit "CM3"). Apart from carrying on the business of civil engineering and building contractors, it is common ground that the appellant is also in the quarry owner business. Rule 3 of the respondent's Rules which governs the union's membership, provides that the union is open to workers who are employed in the construction industry which includes general and special-trade contracting establishments and construction services except workers excluded by s. 9(1). Acting under s. 9(3)(c), the appellant applied to the Director-General of Industrial Relations for ascertainment whether all the workmen in respect of whom recognition was being sought could be classified as workers in the construction industry to enable the respondent union to represent them. The Director-General exercised his discretionary power under s. 9(4B)(b), and referred the matter to the Registrar of Trade Unions for a decision on the question of competency of the respondent to represent all the workmen employed by the appellant as contained in its application. By letter dated 23 January 1984 (see "Exhibit CM4") both the appellant and the respondent were informed by the Director-General that the Registrar had decided that the respondent was not competent to represent the workmen employed in the business of the appellant. The Registrar's blanket decision in Malay dated 16 January 1984 was in the following terms:

> Tuan,
>
> Tuntutan Pengikitirafan oleh Kesatuan Pekerja-Pekerja Binaan Ke atas Kennesion Brothers Sdn. Bhd., Batu Caves, Selangor
>
> Berhubung dengan surat tuan (7)dlm.JPPM.1/10/331/26 bertarikh 7 September 1983 adalah dimaklumkan bahawa setelah dijalankan penyiasatan, saya berpendapat bahawa urusan perniagaan syarikat tersebut tidak termasuk dalam skop keahlian kesatuan tersebut. Oleh yang demikian, kesatuan itu tidak layak mewakili pekerja-pekerja berkenaan.

It is not apparent in the Registrar's letter and nor are we informed by Counsel why the appellant's business could not come within the scope of "construction industry" mentioned in the membership clause of the Union Rules. Be that as it may, the matter was not referred to the Minister for final decision under s. 9(4c)(5) and (6).

But, more than six months later the respondent served on the appellant a second claim for recognition in the prescribed form dated 14 June 1985 (see "Exhibit CM8"). It is pertinent to observe that the second claim for recognition in 1985 was not in respect of all the workers employed by the appellant as was done in 1983, but it was limited to workers employed at the appellant's quarry at Batu Caves worksite. This time, the appellant was unmistakably in a generous mood. By letter dated 1 July 1985 (see "Exhibit CM9"), the appellant straightaway accorded recognition to the respondent not only in respect of quarry workers at Batu Caves, but also of those employed at its Hulu Langat quarries, except those workers excluded by s. 9(1). In the same letter the appellant even made an open invitation to the respondent for a meeting to discuss collective agreement. From "Exhibit CM10" the parties indeed commenced collective bargaining on 1 August 1985 under s. 13 of the Act. A draft collective agreement was submitted and discussed, and most of the terms were finally agreed to, but, no final agreement could be reached due to certain items which the parties were unable to see eye to eye. From the correspondence, negotiation was interrupted in 1986 (see "Exhibits CM16 to CM23"). Finally, by letter dated 12 November 1986, the respondent withdrew all the items on

which the appellant had stood firm, to facilitate the successful signing of the collective agreement (see "Exhibit CM24"). The concession made by the respondent apparently proved insufficient. As the appellant was reluctant to execute the agreed collective agreement, the respondent wrote the following letter in Malay dated 28 January 1987 to the Director-General, for conciliation under s. 18:

> Tuan,
>
> **Per: Seksyen 18 Akta Perhubungan, Perusahaan, Pertikaian mengenai Perjanjian Bersama Diantara Kesatuan Pekerja-Pekerja Binaan dengan Kennesion Brothers Sdn. Bhd., 68100 Batu Caves, Selangor**
>
> Dengan segala hormatnya kami ingin melapurkan kepada tuan mengenai pertikaian yang tersebut di atas dan seterusnya meminta jasa baik tuan untuk campurtangan bagi maksud mencapai satu jalan penyelesian yang adil.
>
> Pertikaian ujud bila Syarikat enggan menandatangani Perjanjian Bersama walaupun ianya telah selesai dirundingkan.
>
> Dengan ini kami berharap satu tindakan segera dapat diambil oleh pihak tuan bagi memastikan para pekerja di Syarikat tersebut mendapat faedah yang lebih baik.

By letter dated 13 March 1987, the Director-General wrote to the appellant and copied to the respondent, inviting them to a conciliatory meeting fixed for 30 March (see "Exhibit CM26"). To the surprise of the respondent, on 3 April 1987, the appellant took the unusual step of unilaterally revoking the recognition accorded on 1 July 1985 before the Director-General could settle the trade dispute.

The reason given by the appellant for the unilateral revocation was that the 1985 recognition which had been accorded for nearly two years was a mistake, as it was said to be contrary to the 1984 Registrar's decision referred to earlier.

By originating summons dated 1 September 1987, the respondent applied for a declaration that the purported unilateral revocation of the 1985 recognition accorded by appellant pursuant to s. 9(3)(a) of the Act was illegal, invalid and of no effect. The application was heard by Harun J (as he then was) on 23 November 1987. Both here and in the Court below, the respondent's case is based primarily on the argument that once a recognition is accorded under s. 9(3)(a), there is no power under the Industrial Relations Act to withdraw or revoke it unilaterally. The appellant's answer to that argument is that no employer can legally recognise or continue to recognise a union already held to be ineligible or incompetent for recognition by the Registrar. From the notes of proceedings, the learned trial Judge agreed with the respondent and allowed the application on the ground that once a trade union had been accorded recognition by an employer, that recognition could not be revoked. Hence the present appeal.

In his persuasive argument, Counsel for the appellant argues that the narrow approach adopted by the learned trial Judge is wrong in law, and that the proper approach to the dispute is to deal first with the competency of the respondent to represent the workmen.

If the union is not competent according to the Registrar, then that is the end of the matter, because no recognition can be accorded by the employer, and as such, the question of revoking a recognition does not arise at all in this case.

Under s. 9(3) of the Act, when an employer is served by a trade union of workmen with a claim in the prescribed form for recognition in respect of workmen or any class of workmen employed by an employer, three choices are given. The employer can either (a) accord recognition; or (b) refuse to accord recognition in which case grounds for such refusal must be given or (c) apply to the Director-General to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union of workmen. A course of action under (c) is obviously neither an agreement and nor a rejection of a claim for recognition. The purpose of the application to the Director-General is to get a decision as to the competency of the trade union concerned before a decision is made by the employer whether to accord or refuse the recognition. It is therefore clear that, when recognition was accorded by the appellant to the respondent on 1 July 1985, the appellant did not require a ruling from the Director-General but had elected to act under s. 9(3)(a). Once the employer has accorded the recognition, we agree with the learned Judge that there appears to be no provision in the Act enabling the employer to act unilaterally in withdrawing or revoking the recognition. The learned Counsel for the appellant is unable to show us under what provisions of the Act the appellant could have done so. In our view, whether the appellant knew or had forgotten about the Registrar's 1984 decision when recognition was accorded in July 1985 is of no legal consequence. Like the decision of the Minister under s. 9(5), the Registrar's adverse decision on competency is not meant to be permanently final. After a lapse of six months, the decision is subject to review on a fresh application for recognition. This is clearly envisaged by the provision of s. 12 which provides:

> 12. Where a claim for recognition under s. 9(2) is resolved under s. 9(4A), or where a decision thereon has been made by the Minister under s. 9(5), resulting in the trade union of workmen concerned not being accorded recognition, such trade union shall not make any further claim for recognition until six months have elapsed from the date of such resolution or decision.

In any event, it is unlikely that the appellant had forgotten about the Registrar's old decision when it accorded recognition in 1985, after merely a lapse of about 17 months. This is particularly so having regard to its conduct in negotiating with the respondent for a collective agreement for more than a year. On balance, it is unlikely that there has been a mistake. In our view, the appellant must have known that the subsequent 1985 claim was distinct from the earlier 1983 claim for recognition. It is significant that the appellant withdrew the recognition only after the respondent had referred their dispute to the Director-General under s. 18, as if in retaliation of the respondent's attempt to compel the appellant to execute the agreed collective agreement.

It is true that the provisions of s. 9 made a distinction between "recognition" and "a scope or representation". This is clear enough from the very title of Part III of the Act which reads, "Recognition and scope of representation of Trade Unions". In our view, two classes of disputes on competency or scope of representation may arise - one under s. 9(1A), and the other under s. 9(3)(c). Under s. 9(1A) a dispute on competency may arise before or after recognition as to whether any workman or workmen are employed in the four capacities excluded by s. 9(1). But disputes on competency under s. 9(3)(c) may only arise before recognition has been accorded or refused. Whether a dispute arises under s. 9(1A) or s. 9(3)(c), the Director-General is empowered under s. 9(4B)(b) to refer the matter to the Registrar for his decision not only on the question of whether the workmen in respect of whom recognition is being sought are members of the trade union, but also on any question of competency of the trade union concerned to represent any workman or class of workmen

in respect of whom recognition is sought to be accorded. It is only when the dispute cannot be resolved by the Director-General that the matter is referred to the Minister for his final decision under s. 9(5), which may include a decision as to who are workmen employed in the managerial, executive, confidential or security capacity.

The learned Counsel for the appellant has referred to us a number of authorities, on the power of the Registrar to decide on the scope and ambit of trade union membership in relation to the nature of the employer's business. He refers to *Attorney-General Malaya v. Chemical Worker's Union of Malaya & Anor.* [1971] 1 MLJ 38; *Electrical Industry Workers Union v. Registrar of Trade Unions & Anor.* [1976] 1 MLJ 177; *Metal Industry Employees Union v. Registrar of Trade Unions & Ors.* [1976] 1 MLJ 220; and the *Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1987] CLJ (Rep) 368. We do not intend to deal with these authorities as they are not really relevant for the purpose of the instant appeal. Before us, it is common ground that the registrar has the statutory power to interpret and make a decision on the competency and scope of representation for the purpose of any dispute under s. 9(1A) or 9(3)(c). This power is clear from the provisions of s. 9(4A) and s. 9(4B)(b), subject only to the final decision of the Minister under sub-sections (5) and (6).

In this appeal, with respect to the second 1985 claim for recognition, no dispute on competency or scope of representation had arisen before recognition was given on 1 July 1985 necessitating any interpretation or decision by the Registrar. If at all, it only arose after recognition was accorded, and as such only disputes under s. 9(1A) could have been referred to the Director-General as far as scope or competency of representation was concerned, but there was clearly no power for the appellant to revoke or withdraw a recognition accorded under s. 9(3)(a) unilaterally.

In the circumstances, the first claim in 1983 must be considered in the context of a dispute before recognition under s. 9(3)(c) of the Act. Whereas the one that arose in 1985 was a post recognition dispute which could only arise under s. 9(1A). Further, the 1983 and 1985 claims for recognition must be treated separately since they were made on a totally different basis. The 1984 decision of the Registrar was a blanket decision based on the respondent's claim for representation in respect of all workmen employed by the appellant not only in its quarries but also in the civil engineering and building contractors business. Whereas the second 1985 claim is for recognition on an entirely different basis. It was confined only to the quarry workers employed at the Batu Caves worksite.

In his 1984 decision, the Registrar was never requested and nor did he address his mind specifically to the issue of competency of the respondent to represent only the quarry workers either at Batu Caves or Hulu Langat. Even in the letter of the Director-General dated 21 May 1987, it clearly shows that the Registrar was merely reaffirming his earlier decision made in respect of respondent's first claim in 1983 (see p. 121 of the appeal record). The letter does not indicate at all that the Registrar had made a review of his 1984 decision on the basis of the limited nature of the second claim in 1985, and as such it must be held that no decision has in fact been made by the Registrar as to the competency of the respondent to represent any of the quarry workers employed by the appellant either at the Batu Caves or Hulu Langat quarry. On the contrary, the fact that the Director-General in March 1987 took cognisance of the respondent's application for conciliation under s. 18 over the dispute on the collective agreement, is an additional proof that the 1985 recognition had been validly accorded. There is no suggestion at all that the Director-General had made a mistake in this respect.

In our judgment, the appellant cannot use the Registrar's decision in respect of the first 1983 claim for recognition for the purpose of revoking or withdrawing unilaterally a recognition accorded in the second 1985 claim, particularly after negotiation for collective agreement had been going on for nearly a year and had reached final agreement. To allow the appellants to do so is not only inequitable but also contrary to the intention of the legislature in s. 12 which allows a trade union to make a fresh claim for recognition even in a situation where the Minister has made a final decision against recognition provided six months had elapsed from the date of such decision. In the present appeal, more than six months had elapsed when the 1985 claim was made, and for reasons already stated, we see no reason why the order of the learned trial Judge should be disturbed.

We therefore rule that on the facts of the present case the appellant cannot after according recognition to the respondent under s. 9(3)(a) of the Industrial Relations Act revoke or withdraw such recognition unilaterally on account of an earlier decision of the Registrar pertaining to a distinct and separate application for recognition. The appeal is accordingly dismissed with costs, and we also order that the deposit be paid to the respondent to account of taxed costs.

Also found at [1989] 2 CLJ 569